IN THE SUPREME COURT OF IOWA

No. 16-0121
Polk County No. LACL128361

WALNUT CREEK TOWNHOMES ASSOCIATION,

Plaintiff-Appellant,

v.

DEPOSITORS INSURANCE COMPANY,

Defendant-Appellee.

APPEAL FROM THE
IOWA DISTRICT COURT FOR POLK COUNTY
The Honorable Robert B. Hanson

APPELLEE'S FINAL BRIEF

APRYL M. DELANGE
JEFF M. MARGOLIN
HOPKINS & HUEBNER, P.C.
2700 GRAND AVENUE, SUITE 111
DES MOINES, IA 50312
TELEPHONE: (515) 244-0111
FACSIMILE: (515) 244-8935
E-MAIL: adelange@hhlawpc.com
E-MAIL: jmargolin@hhlawpc.com

ATTORNEYS FOR DEFENDANT-APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE ASSOCIATION'S POST-JUDGMENT MOTION DID NOT TOLL THE TIME FOR APPEAL, AND THUS, THE APPEAL FILED 154 DAYS FOLLOWING THE DISTRICT COURT'S JUDGMENT WAS UNTIMELY AND SHOULD BE DISMISSED.

Ahls v. Sherwood/Division of Harsco Corp., 473 N.W.2d 619 (Iowa 1991)

Concerned Citizens of Southeast Polk School Dist. v. City Development Bd. of State, 872 N.W.2d 399 (Iowa 2015)

Explore Information Services v. Iowa Court Information System, 636 N.W.2d 50 (Iowa 2001)

Hedlund v. State, 875 N.W.2d 720, 725 (Iowa 2016)

Tenney v. Atlantic Associates, 594 N.W.2d 11 (Iowa 1999)

Iowa R. Civ. P. 1.904(2)

II. THE DISTRICT COURT CORRECTLY DETERMINED DEPOSITORS DID NOT BREACH THE POLICY OF INSURANCE.

Amish Connection, Inc. v. State Farm Fire and Cas. Co., 861 N.W.2d 230 (Iowa 2015)

Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216 (Iowa 2007)

Jones v. State Farm Mut. Ins. Co., 760 N.W.2d 186 (Iowa 2008)

Monroe Cty. v. Int'l Ins. Co., 609 N.W.2d 522 (Iowa 2000)

Postell v. American Family Mutual Ins. Co., 823 N.W.2d 35 (Iowa 2012)

ROUTING STATEMENT

This case is properly transferred to the Iowa Court of Appeals. The case presents the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Walnut Creek Townhomes Association ("Association") made a claim to Depositors Insurance Company ("Depositors") claiming hail damage to its buildings, particularly the roofs, that it alleged to have occurred on August 8, 2012, during a hail storm. (Petition, ¶¶ 6-7). It was undisputed by Depositors that a hail storm occurred on August 8, 2012, and that hail fell upon the Association's buildings. (Answer, ¶ 9). Depositors issued payment in the amount of $124,656.70 for hail damage to the Association's "soft metals" which encompassed gutters, downspouts, and facia. (Def. Ex. G; Def. Ex. H - App. 304-305). Depositors denied the claim for roof damage. (App. 249-251). The Association claimed Depositors breached the insurance contract by denying the roof claim. (Petition, First Cause of Action-Breach of Contract).

Procedural History and Disposition of Case

As part of the case proceedings, the parties filed cross summary judgments. (Summary Judgment pleadings). The Court ruled the Association's motion for summary judgment was denied, and Depositors' partial motion for summary judgment was granted. (App. 324-331). As the appraisal date approached, Depositors filed a motion for status conference and request for expedited relief due to concerns with how the appraisal would proceed. (App. 332-334). The appraisal was held on May 5, 2015. (Trial Tr. p. 199, ln. 21; App. 199).

The matter came before the District Court for a bench trial on May 27-28, 2015. (App. 1-230). On August 19, 2015, the Court issued its Findings of Fact, Conclusions of Law and Judgment ruling in favor of Depositors denying the Association's breach of contract claim and denying the Association's claim for declaratory judgment. (App. 343-353).

On September 3, 2015, the Association purported to file a motion for reconsideration or for new trial. (Pl's post-judgment motion). Depositors resisted. (Def's resistance to Pl's post-judgment motion). On December 21, 2015, the Court denied the Association's motion to reconsider or for new trial. (App. 354-356). The notice of appeal was filed on January 21, 2016. (App. 357-358).

STATEMENT OF THE FACTS

The Association alleges it suffered hail storm damage to its buildings, particularly the roofs, on August 8, 2012, and seeks recovery for this alleged damage under its Policy of insurance issued by Depositors. (Petition). Depositors does not dispute a hail storm occurred on August 8, 2012, and admits that hail fell upon the Association's buildings. (Answer). Depositors issued payment in the amount of $124,656.79 for hail damage to the Association's "soft metals" generally known as gutters, downspouts, and facia. (Def. Ex. G; Def Ex. H, App. 304-305). A reservation of rights letter was issued on February 13, 2013, noting Depositors' reliance upon policy provisions. (App. 249-251).

The dispute for resolution by the District Court centered upon whether the hail caused damage to the roofs at the Association and whether a concurrent cause excluded coverage. (App. 343-353). Depositors presented evidence at trial that no hail damage was sustained to the Association's roofs as a result of the August 8, 2012, storm. (App. 240-248). Depositors also presented uncontested evidence of several additional storms impacting the Association roofs, a significant manufacturing defect in the shingles that pre-dated the storm, and wear and tear in support of its reliance upon the policy exclusions. (App. 346-347, 349-351).

Prior to the August 8, 2012, hail storm, the Association knew of issues with the roofs on the buildings and had a plan in place to begin replacement of these roofs. (App. 306-323). John Westlund and Erin Forke, both residents and members of the Association board or committees at various times, testified at trial. The Association minutes beginning on September 20, 2011, nearly 9 months before the August 8, 2012, storm, note the roof replacement issues and that the Association was discussing a plan to address the roof issues. (App. 308, 311). The Association minutes of October 11, 2011; October 18, 2011; December 20, 2011; January 17, 2012; and June 19, 2012, all mention the roofs and shingle issues. (App. 312-313, 315, 317-323). The Association minutes also show that it was aware of the manufacturer defect in the New Horizon shingles, that the shingles were faulty prior to August 8, 2012, and that the warranty claim with CertainTeed, the shingle manufacturer, would not cover labor costs. (App. 315). The Association had been working with Hedberg & Son Roofing (Mark Gooding) prior to August 8, 2012, related to making the warranty claim for the defective shingles. (App. 322; Trial Tr. p. 170 , ln. 13-25 - p. 171, ln. 1-20; App. 170-171). The Association had actually rated the shingles on a scale of 1 to 5, with 1 being in the worst condition, prior to August 8, 2012, to begin replacing the roofs. (App. 306-307).

Upon receipt of the claim following the August 8, 2012, storm, Depositors retained an engineering company, Haag Engineering, to analyze the Association's buildings for storm damage. (App. 240-241). Haag Engineering was founded in 1925 and has evolved into a nationwide forensic engineering and consulting company. (Def. Ex. D, "About Haag…"). Haag Engineering offers education courses to teach people to assess damage to roofs. (Def. Ex. D, "About Haag Education…"). Haag Engineering has conducted hail impact studies to determine a threshold for the size of hail required to damage the shingles. (Trial Tr. p. 102, ln. 11-25 - p. 103, ln. 1-6; App. 102-103). Based upon the studies for hail damage, a minimum of 1.0 inch diameter hail stones are required for a three tab shingles and 1.25 inch stones are required for laminated shingles. (Trial Tr. p. 103, ln. 2-6; App. 103). Two Haag Engineers, Robert A. Danielson, Professional Engineer and Richard Herzog, Professional Engineer, Registered Roof Consultant, and Meteorologist, inspected the Association's buildings following the August 8, 2012, storm. (App. 240, 243; Def. Ex. B-C).

After the two Haag Engineers completed detailed inspections over a three-day period, reviewed the history of the weather (including nine separate hail events in Urbandale between 2007 through 2012), interviewed John Westlund and performed additional investigation the engineers deemed

appropriate, Haag Engineering concluded there was no hail damage to the Association roofs as a result of the August 8, 2012, storm and issued a detailed report on January 18, 2013. (App. 241-248). Both Haag Engineers, Robert A. Danielson and Richard Herzog, testified at trial as to their qualifications, findings, and conclusions within a reasonable degree of engineering certainty. (Def. Exs. A, B, C). The Haag Engineering findings related to the shingles were as follows:

1. There was no hail-caused damage to the shingles on the Walnut Creek Townhome Association property roofs.
2. Shingle surface defects and areas of localized exposed tack coat (minor granular loss) which did not feature a fractured reinforcing mat were unrelated to hailstone impact, but rather from manufacturing variations, mechanical contact (including foot traffic), and normal weathering effects of the shingles.
3. There were three field shingles and eight hip shingles that had been displaced consistent with wind effects. Those shingles can be economically repaired by replacing damages units.

(App. 247).

The trial testimony by the eyewitness to the storm, Erin Forke, was the hail on August 8, 2012, was pea-sized and dime-sized. (Trial Tr. p. 52, ln. 14-16; App. 52). He stated specifically "mainly it was pea-size, and we had large probably dime-size hail." (Trial Tr. p. 52, ln. 15-16; App. 52). Robert Danielson conclusively testified that pea-sized and dime-sized hail are not of sufficient size to cause hail damage to the shingles at the

Association. (Trial Tr. p. 148, ln. 19-25 - p. 149, ln. 1-8; App. 148-149). Damage from hail results in fractures, ruptures and bruises in the shingles. (Trial Tr. p. 111, ln. 3-7; App. 111). The Haag Engineers found no such damage caused by hail to the roofs at the Association following the August 8, 2012, storm. (Trial Tr. p. 111, ln. 8-10; App. 111).

The Association entered into a contract with a public adjuster, Tim Barthelemy owner of Independent Public Adjusters, which provides for a contingent fee of 10% of any monies paid by Depositors to the Association as a result of damage from the August 8, 2012, storm. (Def. Ex. L). Tim Barthelemy's role is to assist the owner with insurance claims. (Trial Tr. p. 63, ln. 10-12; App. 63). The Independent Public Adjuster's website notes its "clients are assured the best and highest settlements" and the "professional services always result in significantly greater outcome for…clients." (Def. Ex. U, p. U-2).

The Association also entered into a contract with Green Guard Construction, a self-professed storm chasing company, owned by Nick Waterman. (Trial Tr. p. 42, ln. 5-11; App. 42). Nick Waterman testified his company is set up in four states to "try to be as close to any weather event as possible." (Trial Tr. p. 42, ln. 8-10; App. 42). Nick Waterman characterized his company's effort as getting into a neighborhood following a storm event

and soliciting the opportunity from property owners to go onto roofs, look for damage, and make insurance claims with the goal of obtaining insurance coverage. (Trial Tr. p. 42, ln. 12-25; App. 42). It has four employees and subcontracts all of the actual roofing work out. (Trial Tr. p. 41, ln. 18-25 - p. 42, ln. 1; App. 41-42). Green Guard's compensation is the insurance payout for the roof, less any amount owed a public adjustor. (Trial Tr. p. 43, ln. 4-6; App. 43).

The only individual to testify at the trial who had been on the roofs prior to and after August 8, 2012, was Marcus Harbert from Hedberg & Son Roofing. (Trial Tr. p. 170, ln. 13-25- p. 171, ln. 1-20, p. 175, ln. 2-22; App. 170-171, 175). Marcus Harbert has worked for Hedberg & Son Roofing for 18 years and the company has been in business for 35 years. (Trial Tr. p. 168, ln. 25 - p. 169, ln. 1-3; App. 168-169). He performs roof inspections as part of his job, mainly for hail damage assessments. (Trial Tr. p. 170, ln. 1-12; App. 170).

Marcus Harbert performed a roof inspection at the Association in the summer of 2011 to give an opinion concerning the life expectancy of the roofs. (Trial Tr. p. 170, ln. 13-25 - p. 171, ln. 1-20; App. 170-171). At the time of the inspection in 2011, Marcus Harbert noted that the shingles on the Association roofs were CertainTeed, New Horizons, and that there was a

known problem with the shingles which included a manufacturer defect consisting of cracking of the appliques and significant granular loss through the entire shingle. (Trial Tr. p. 172, ln. 15-24; App. 172). At the time of the inspection in 2011, Marcus Harbert was of the opinion that the roofs needed to be replaced and that the roofs would not last the entire manufacturer warranty of 25 years. (Trial Tr. p. 173, ln. 8-25 - p. 174, ln. 1-23; App. 173-174).

Marcus Harbert also inspected the roofs within a week after the August 8, 2012, storm and based upon his inspection did not recommend an insurance claim be pursued by the Association for hail damage to the roofs. (Trial Tr. p. 175, ln. 2-22; App. 175). Marcus Harbert recommended the Association follow through with the warranty claim to CertainTeed. (Trial Tr. p. 175, ln. 23-25 - p. 176, ln. 12; App. 175-176). Marcus Harbert noted the condition of the shingles were in "very bad condition" and needed to be replaced because of the shingle defect, not as a result of the August 8, 2012, storm. (Trial Tr. p. 176, ln. 5-12; App. 176).

At the time of trial, the Association had continued to pursue the warranty claim with CertainTeed. (Def. Ex. S). Misty Benge, the manager of the Association from Conlin Properties, testified the Association's board

directed her to sign a warranty extension. (Def. Ex. S). Misty Benge executed the CertainTeed release on February 4, 2015. (Def. Ex. R, p. R-4).

The Appraisal occurred on May 5, 2015. (Trial Tr. p. 199, ln. 21; App. 199). James Pierce was the Association's appraiser. (Def. Ex. V). Eric Howell was Depositors' appraiser. (Trial Tr. p. 196, ln. 24-25; App. 196). Larry Roth was the umpire; however, Eric Howell provided testimony at trial of his concerns related to Mr. Roth's qualifications as an umpire. (Trial Tr. p. 197, ln. 15-25, p. 198, ln. 1-2, 21-25, p. 199, ln. 1-25, p. 200, ln. 1-7; App. 197-200). Eric Howell is a commercial and residential property adjustor. (Trial Tr. p. 196, ln. 10-11; App. 196). Eric Howell testified that the appraisers must agree upon the umpire for the appraisal. (Trial Tr. p. 197, ln. 1-5; App. 197). Eric Howell had prior experience with Larry Roth and had concerns Mr. Roth did not have the skills necessary to assess roofs for hail damage. (Trial Tr. p. 197, ln. 15-25, p. 198, ln. 1-2, 21-25, p. 199, ln. 1-25, p. 200, ln. 1-7; App. 197-200). Eric Howell understood Larry Roth was bringing an independent engineer experienced in assessing hail damage to the appraisal and that was the basis upon which Eric Howell approved Mr. Roth as an umpire. (Trial Tr. p. 199, ln. 8-20; App. 199). When Eric Howell arrived at the appraisal on May 5, 2015, Larry Roth did not have the

independent engineer present to consult. (Trial Tr. p. 199, ln. 21-15 - p. 200, ln. 1-7; App. 199-200).

Larry Roth and James Pierce signed the Appraisal Award. (App. 233). The Award covers four broad categories of direct physical loss roofing; matching roof (additional); siding, gutters, fascia; and air conditioners. (App. 231). Eric Howell did not sign the Award. (Trial Tr. p. 205, ln. 24-25; App. 205). The Appraisal Award specifically notes that "[t]he award does not include an evaluation or determination of coverage, policy exclusions or relative causation of the same." (App. 231).

ARGUMENT

I. THE ASSOCIATION'S POST-JUDGMENT MOTION DID NOT TOLL THE TIME FOR APPEAL, AND THUS, THE APPEAL FILED 154 DAYS FOLLOWING THE DISTRICT COURT'S JUDGMENT WAS UNTIMELY AND SHOULD BE DISMISSED.

The Association's appeal is untimely and, therefore, no issues have been preserved for appeal. On August, 19, 2015, the District Court entered Findings of Fact, Conclusions of Law and Judgment following a two-day bench trial. (App. 343-353). A judgment is final if it "conclusively adjudicates all of the rights of the parties." Ahls v. Sherwood/Division of Harsco Corp., 473 N.W.2d 619, 621 (Iowa 1991). Therefore, the District Court's August 19, 2015, Findings of Fact, Conclusions of Law and Judgment was a final judgment concerning the Association's breach of insurance contract claim against Depositors. A party has thirty days to appeal a final judgment. Iowa R. App. P. 1.601(1). Thus, the Association's time for appeal expired September 18, 2015.

On September 3, 2015, the Association filed a Motion called a "Motion for Reconsideration, Including Additional Findings to Be Enlarged and/or Modified pursuant to Iowa Rule of Civil Procedure 1.9042 [sic] and/or Motion for a New Trial pursuant to Iowa Rule of Civil Procedure

1.1004." (Pl's post-judgment motion). A post-judgment motion may toll the thirty-day window for an appeal, but only if it is based on proper grounds. Tenney v. Atlantic Associates, 594 N.W.2d 11, 14 (Iowa 1999). The Iowa Supreme Court has "repeatedly stated that only a 'proper rule 1.904(2)[1] motion' extends the time for appeal from the date of the original ruling." Hedlund v. State, 875 N.W.2d 720, 725 (Iowa 2016) (string citation omitted).

On September 11, 2015, Depositors filed a Resistance to the Association's post-trial motion arguing the Association's Motion was simply a rehash of all facts and legal matters thoroughly considered by the Court in its August 19, 2015, ruling. (Def's resistance to Pl's post-judgment motion). A post-judgment motion that is simply a "rehash of legal issues previously raised" is not a proper mechanism for tolling the appeal deadline. See Explore Information Services v. Iowa Court Information System, 636 N.W.2d 50, 57 (Iowa 2001). Therefore, because the Association's Motion was improper, it did not toll the time of appeal.

On December 21, 2015, the Court agreed with Depositors and denied Plaintiff's post-judgment motion stating:

> As to Plaintiff's Rule 1.904(2) motion, the court agrees with defendant that the motion basically

[1] Rule 1.904(2) was previously numbered 179(b).

> *asks the court to revisit matters that it has already adequately addressed in its final ruling.* With the following clarification, the court believes its final ruling is fully supported by both the trial record and the applicable law.

(App. 354, emphasis added).

The "clarification" of the District Court was one of semantics and did not enlarge or modify the August 19, 2015, Findings of Facts, Conclusions of Law and Judgment. (App. 354-355). Rather it confirmed the prior Ruling that the Association "failed to prove at trial that its loss was covered by the policy" and that Depositors "proved at trial coverage was excluded by the anti-concurrent cause provisions of the subject insurance policy...." (App. 354-355).

The Association filed the notice of appeal on January 20, 2016, which was 154 days after the Court's Findings of Facts, Conclusions of Law and Judgment entered on August 19, 2015. (App. 357-358). An untimely appeal must be dismissed for lack of subject matter jurisdiction. Concerned Citizens of Southeast Polk School Dist. v. City Development Bd. of State, 872 N.W.2d 399, 402 (Iowa 2015). The Association's improper post-judgment motion did not toll the time for appeal. Therefore, the Appellate Court does not have jurisdiction over this case and it should be dismissed.

II. THE DISTRICT COURT CORRECTLY DETERMINED DEPOSITORS DID NOT BREACH THE POLICY OF INSURANCE.

If the Appellate Court determines the notice of appeal was timely, error was preserved by the Association concerning whether the District Court correctly determined Depositors did not breach the Policy of insurance with regard to the roof claim. The review of construction of an insurance policy is for correction of errors at law. Postell v. American Family Mutual Ins. Co., 823 N.W.2d 35, 41 (Iowa 2012) and Iowa R. App. P. 6.907.

A. The Insurance Policy – Relevant Provisions

The Association purchased an insurance policy, Policy number BPHD 5605180237, from Depositors. (App. 252-303). The Policy was in effect from September 10, 2011, until September 10, 2012. (App. 253). The Policy has broad loss coverage and included two anticoncurrent-cause clauses. (App. 258-259, 275, 279). The Policy loss provision and the first anticoncurrent-cause provision state:

> **A. COVERAGES** – [Depositors] will pay for direct physical loss of or damage to the Covered Property at the described premises in the Declarations caused by or resulting from any Covered Cause of Loss.

(App. 258).

> 3. **COVERED CAUSES OF LOSS**
> This Coverage Form insures against Risks of Direct Physical Loss unless the loss is:

a. Excluded in Section B. EXCLUSIONS;
b. Limited in paragraph A.4 LIMITATIONS in this section; *or*
c. Limited or excluded in Section E. PROPERTY LOSS CONDITIONS *or* Section F. PROPERTY GENERAL CONDITIONS.

(App. 259).

The second anticoncurrent-cause provision states as follows:

B. **EXCLUSIONS**

1. [Depositors] will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. …

(App. 275).

l. **Other Types of Loss**
(1) Wear and Tear;
(2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself; …
(4) settling, crackling, shrinking, or expansion

(App. 279).

3. [Depositors] will not pay for loss or damage caused by or resulting from…

(c) **Negligent Work**
Faulty, inadequate or defective:
(2)…workmanship, work methods, repair, construction, renovation, remodeling, …failure to protect the property;
(3) materials used in repair, construction, renovation or remodeling; or

(4) maintenance of part or all of any property on or off the described premises.

(App. 279-280).

B. Breach of Contract Issues

In order to prevail on the breach of contract claim, the Association was required to show by a preponderance of the evidence that: (1) there was physical loss (damage) to the roofs as a result of the August 8, 2012, storm; and (2) the Policy covered the loss. (App. 348). Depositors denied the shingles were damaged in the storm and also relied upon specific Policy exclusions.

The District Court correctly determined Depositors did not breach the contract of insurance because the Association failed to prove the roof[2] was covered under the Policy. The District Court was presented with significant evidence through the testimony the two Haag Engineers, Robert Danielson and Richard Herzog, and Marcus Harbert that the shingles sustained no hail damage as a result of the August 8, 2012, storm. Additionally, Depositors presented uncontroverted evidence of concurrent causes of loss including other storm events, the manufacturing defect contained in the shingles and wear and tear which excluded coverage.

[2] The Association did not appeal the finding that the air conditioning units were not property of the Association. (App. 347).

The District Court properly found the Association failed to prove the storm was the only direct or indirect cause of physical damage to the roofs. (App. 349). The Policy excludes coverage in the event of any concurrent cause of physical loss. (App. 275). The District Court correctly found Marcus Harbert provided "highly persuasive" testimony in this regard. (App. 349). Marcus Harbert is a roofing expert with Hedberg & Sons Roofing and the District Court correctly noted the evidence at trial revealed he was the only qualified person to have inspected the Association's roof prior to and shortly after the storm. (App. 347). Following the inspection in 2011, Marcus Harbert recommended the Association pursue a warranty claim against the shingle manufacturer because the shingles were so badly damaged due to the manufacturer defect as to reduce the lifespan from 25 years to five years. (App. 347). Upon inspection within a week of the storm, Marcus Harbert saw no storm damage to pursue an insurance claim. (App. 347).

The District Court also correctly found the Association was fully aware of the shingle defect and began discussing a plan to replace the roofs as early as September 20, 2011, engaging Hedberg & Son to aid in the process. (App. 347). At five separate meetings between October 2011 and June 2012, the Association acknowledged and discussed the manufacturer's

defect, the damage it caused, the need to replace the roofs, and that a warranty claim would not cover the entirety of the labor costs. (App. 308-323).

The District Court also properly considered the testimony of the two Haag Engineers, Robert Danielson and Richard Herzog. Haag Engineering is a nationwide forensic engineering and consulting company. (Def. Ex. D). The Haag experts described typical hail damage as fractures, ruptures and bruises and through its research testified that hail must be a minimum of 1 to 1.25 inches in diameter to damage the type of shingles covering the Association's roofs. (App. 346). Neither of the Haag Engineers experts found hail damage following the August 8, 2012, storm on the Association's roof. (App. 346). The eyewitness testified the hail was pea or dime sized. (Trial Tr. p. 52, ln. 14-16; App. 52). Testimony was also provided concerning how the manufacturer's defect caused cracking and granular loss to the shingle. (App. 346). These experts concluded the shingle damage was due to the manufacturer defect, wear and tear and normal weathering. (App. 240-248). Additionally, the Haag experts identified nine other potentially damaging hail storm events in the location of the Association between 2007-2012. (App. 346-347).

Thus, the evidence clearly established the shingles were damaged due to the manufacturer's defect which was known by the Association as early as September 2011. Further, the defense experts offered evidence of multiple potentially damaging hail storms. The Association's evidence was presented by Tim Barthelemy and Nick Waterman, neither of whom are professional engineers and neither of whom provided a written report of findings or opinions. Tim Barthelemy and Nick Waterman were never on the Association roofs prior to August 8, 2012. Further, Tim Barthelemy's and Nick Waterman's compensation is directly tied to any insurance recovery from Depositors for the roofs at the Association. Therefore, the District Court correctly held the August 8, 2012, storm was not the sole cause of the damaged roofs. (App. 349).

The District Court correctly found Depositors was successful in proving the known and acknowledged product defect triggered deterioration to the shingles prior to the August 8, 2012, storm. The Policy excludes coverage for defective material used in construction. (App. 279-280). The Association's attempt to parse out part of the shingle is meritless and in reality acknowledges the Association's realization that the shingles were defective before the August 8, 2012, storm. The Haag experts testified the

product defect impacted the entirety of the shingles. Further, the entire shingle would require replacement to cure the manufacturer's defect.

The law in Iowa is that no insurance coverage exists if an insurance policy contains an anticoncurrent-cause provision, there are multiple causes for damage to an insured property, and at least one of those causes is an excluded cause. An anticoncurrent-cause provision allows an insurance company to deny coverage if damage is caused by any excluded cause. Amish Connection, Inc. v. State Farm Fire and Cas. Co., 861 N.W.2d 230, 240 (Iowa 2015). This ability to deny coverage exists even if a covered cause is a concurrent cause of damage. Id. at 241-43 (holding anticoncurrent-cause provision eliminated coverage due to the rain exclusion in plaintiff's insurance policy even though a breaking drainpipe was a concurrent cause of the damage). Anticoncurrent-cause provisions are enforceable and, if the clause is unambiguous, the Court will enforce the policy as written. Id. "[I]nsurance coverage is a contractual matter and is ultimately based on policy provision[s]." Salem United Methodist Church of Cedar Rapids v. Church Mut. Ins. Co., 864 N.W.2d 553, at *3 (Iowa Ct. App. 2015) (unpublished decision) (quoting Jones v. State Farm Mut. Ins. Co., 760 N.W.2d 186, 188 (Iowa 2008)). Insurance policies may provide limitations on coverage because the insurance company does not want to be

responsible for such items as normal wear and tear, routine maintenance, installation issues like poor workmanship and manufacturer defects.

The Policy's first anticoncurrent-cause provision contains an "or" just as the provision analyzed in Amish Connection. See Amish Connection, 861 N.W.2d at 240-241. Both provisions utilize a disjunctive "or" to create coverage limitations. The provisions provide that all losses are covered, unless the loss is caused by an event excluded or limited in an exclusion or limitation. Even if only one of multiple causes is covered by a limitation or exclusion, that non-covered cause is sufficient to defeat coverage. Id. at 241 (citing Monroe Cty. v. Int'l Ins. Co., 609 N.W.2d 522, 525 (Iowa 2000) ("holding disjunctive 'or' between alternate provisions of exclusion defeated coverage even though only one alternative applied").

The Policy's second anticoncurrent-cause provision is included at the beginning of Section B, EXCLUSIONS. That provision states that any loss caused by an excluded cause or a cause contained in the limitations is not a covered loss even if the loss was concurrently caused by a covered cause. The Iowa Court of Appeals has analyzed the same anticoncurrent-cause provision. See Salem United, 864 N.W.2d 553, at *2. The Court of Appeals held the anticoncurrent-cause provision would allow coverage to be defeated if the jury in the new trial found an excluded cause was a concurrent cause

of the damage finding the "policy...unambiguously excludes coverage for damages that are concurrently caused by a covered cause-such as a sewer back up-and an uncovered cause-such as flooding by its language." Id. at *3. "Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Id.

The evidence submitted of the causes of the Association's roof damage are excluded causes--wear and tear, mechanical related to the installation, faulty workmanship, and manufacturer defects in the shingles and was fully considered by the District Court. A warranty was negotiated and signed by the Association providing material and a labor allowance for the known manufacturing defect in the shingles that existed before the August 8, 2012 storm. (Def. Ex. R, pp. R-3-R-4, Def. Ex. S, p. S-2). The Association agreed the manufacturing defect existed. Marcus Harbert, the one person at trial who had been on the roofs before the August 8, 2012, storm, testified the roofs needed replaced due to the manufacturing defect. Even if the shingles had suffered hail damage in the August 8, 2012, storm, the concurrent causes of the damage to the shingles preclude coverage for the Association's claim of hail damage to the roofs. The Court "enforces unambiguous exclusions as written." Amish Connection, 861 N.W.2d at 236 (quoting Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728

N.W.2d 216, 222 (Iowa 2007)). Therefore, the District Court correctly determined Depositors did not breach the insurance Policy.

III. THE DISTRICT COURT CORRECTLY DETERMINED THE APPRAISAL AWARD WAS NOT BINDING.

If the Appellate Court determines the notice of appeal was timely, error was preserved by the Association concerning whether the District Court correctly determined the appraisal award was not binding. The review is for errors at law. See Iowa R. App. P. 6.907.

The Association goes to great length to set forth a recitation of Iowa case law regarding the use of appraisals and arbitration in an attempt to bolster its argument the appraisal in this case was binding and should have been rubber stamped by the District Court. The Association goes so far as to cite to a line of fire cases[3] and note codification of an appraisal process in fire losses which is unpersuasive considering this is not a fire loss. See Iowa Code § 515.109(6). The District Court correctly held the appraisal was not binding under the circumstances of this litigation.

Iowa law is clear construction and interpretation of insurance policy provisions are matters of law for the Court to decide. North Glenn

---

[3] Central Life Ins. Co. v. Aetna Cas. & Surety Co., 466 N.W.2d 257 (Iowa 1991); Vincent v. German Ins. Co., 120 Iowa 272, 94 N.W. 458 (1903); and George Dee & Sons Co. v. Key Fire Ins. Co., 104 Iowa 167, 73 N.W. 594 (1897) all involved fire losses.

Homeowner's Association v. State Farm Fire and Cas. Co., 854 N.W.2d 67, 70-71 (Iowa Ct. App. 2014). While Depositors acknowledges the Court favors the appraisal process as an efficient form of dispute resolution; the Court of Appeals has acknowledged the ultimate authority when a Policy dispute is involved is the Court, not the appraisal panel. Id. at 71. The District Court aptly noted that "[w]hether the appraisal award is binding and conclusive on the issues 'will depend on the nature of the damage, the possible causes, the parties' dispute, and the structure of the appraisal award.'" (Ruling 8/19/15, p. 9 citing North Glenn, 854 N.W.2d at 71 quoting Quade v. Secura Ins., 814 N.W.2d 703, 708 (Minn. 2012)). The appraisal panel does not have the necessary knowledge of Iowa law or of the insurance policy provisions to decide such issues.

The appraisal process works effectively when the parties agree upon the cause of the loss and simply need a determination of the amount of loss. "Appraisal awards do not provide a formal judgment and may be set aside by a court." Central Life Ins. Co., 466 N.W.2d at 260. "[O]nce the appraisers conclude their work, the issue of coverage may be further litigated," and "the causation determinations by the appraisers may be subject to further review by the district court." (Summary Judgment Ruling 10/07/14, p. 4 quoting North Glenn, 854 N.W.2d at 71).

Under the circumstances of this case, the value of the roof replacement was not the central issue. Rather, the issue centered on Depositors denial of the roof claim based upon the Policy of insurance. Depositors never agreed the August 8, 2012, hail storm caused damage to the roof and reserved all coverage defenses to be presented to and determined by the District Court. The Association's slippery slope argument is without merit because many times the appraisal process can efficiently and effectively determine the amount of loss when causation and coverage are not at issue. For example, in a situation where the parties agree hail loss was the only cause of the roof damage, the appraisal process provides an effective and efficient manner of resolving the value of the loss. This case is not one of those situations because there was not agreement as to the cause of the damage to the shingles and resulting coverage under the Policy. The appraisal award itself states "[t]he award does not include an evaluation or determination of coverage, policy exclusions or relative causation of the same." (App. 231). Depositors was therefore able to litigate the issues and the District Court was correct in determining the appraisal award was not binding because ultimately the roof claim was not covered under the Policy.

The Association attempts to persuade the Court that the appraisal process in this case functioned as a binding arbitration proceeding.

Throughout the brief, the Association indicates the appraisal panel "heard testimony and reviewed evidence from the parties." (Association Pr. Br. P. 1). This is an inaccurate portrayal of the process used in this case.

First and foremost, Depositors objected to the Association's attempt to turn the appraisal into something more than the Policy provided. The Policy states:

> If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser after receiving a written request from the other, and will advise the other party of the name of such appraiser within 20 days. The two appraisers will select an umpire. If appraisers cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of property and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed by any two will be binding. Each party will:
> a. Pay its chosen appraiser; and
> b. Bear the other expenses of the appraisal and umpire equally.
>
> *If there is an appraisal, we will still retain our right to deny the claim.*

(App. 282, ¶ E2)(Emphasis added).

Depositors sought expedited relief when it became clear the Association intended to proceed in a fashion contrary to the District Court's prior ruling on cross summary judgments. (App. 332-335). The District

Court determined the parties could submit documentation for the panel to consider. (App. 341-342). No attorneys were present at the appraisal. No witnesses were put under oath and thus no "testimony was provided" to the panel as stated by the Association. No recording was made of the process.

Secondly, the process used was not an arbitration proceeding and Depositors objected to the appraisal proceeding in that fashion. No arbitration rules were in force. The unpublished decision of Taylor v. Farm Bureau is relied upon by the Association. Taylor v. Farm Bureau, 759 N.W.2d 2 (Iowa Ct. App. 2008) (unpublished decision). In Taylor, the umpire utilized Iowa Code Chapter 679A and followed an arbitration process. Id. at *4. The Court noted there is a distinction between "appraisal" and "arbitration" noting that "both proceedings are designed to effect speedy and efficient resolutions in lieu of judicial proceedings, [and that] arbitration will generally decide an entire controversy." Id. (other citations omitted). The Court went on to further distinguish the proceedings noting "[a]n appraisal, on the other hand, establishes only the amount of the loss and not liability for the loss under the insurance policy." Id. (citing Terra Industries Inc. v. Commonwealth Ins. Co. of America, 981 F. Supp. 581, 607 (N.D. Iowa 1997)). Additionally the Court noted while "arbitrations are governed by Iowa Code chapter 679A, [t]here is no

corresponding statute governing appraisal proceedings." Id. at *5. In Taylor, the parties agreed to proceeding under the rules established for arbitration. Id. Here, Depositors never agreed to proceed with an arbitration.

It is for this reason the Minnesota case of Creekwood Rental Townhomes, LLC v. Kiln Underwriting, LLC relied upon by the Association in support of its theory the appraisal award is binding is distinguishable. See Creekwood Rental Townhomes, LLC v. Kiln Underwriting, LLC, 11 F. Supp. 3d 909 (D. Minn. 2014). In review of the Minnesota Court's recitation of the process in Creekwood, it is clear the parties followed arbitration rules and evidence was submitted via testimony and representation of counsel. Such was not the case for the appraisal involving the Association's properties.

Third, the Association failed to present any testimony from its appraiser or the umpire, Larry Roth, for consideration by the District Court. Had the Association intended to rely upon the process as binding, the sworn testimony of what was and what was not considered by the panel should have been presented to the District Court.

Depositors called its appraiser, Eric Howell, to testify of his concern with the appraisal process and unqualified nature of the umpire, Larry Roth.

(Trial Tr. p. 197, ln. 15-25, p. 198, ln. 1-2, 21-25, p. 199, ln. 1-25, p. 200, ln. 1-7; App. 197-200). Mr. Howell testified that he agreed to use the umpire with the understanding a qualified engineer would be present with Mr. Roth to provide expert advice to the umpire whether hail had damaged the shingles. (Trial Tr. p. 197, ln. 15-25, p. 198, ln. 1-2, 21-25, p. 199, ln. 1-25, p. 200, ln. 1-7; App. 197-200). The qualified engineer did not appear for the appraisal. (Trial Tr. p. 199, ln. 12-25; App. 199). Thus, the Court was presented evidence by Depositors of irregularities in the appraisal process rising to the level of mistake or misfeasance. See Central Life Ins. Co., 466 N.W.2d at 260.

Regardless, because of the nature of Depositors denial, the appraisal award was not binding. The Court is the ultimate decider of issues concerning interpretation and application of insurance Policy provisions. For these reasons, the District Court correctly determined the appraisal award was not binding.

IV. THE ASSOCIATION IS NOT ENTITLED TO REPLACEMENT COST FOR THE SOFT METALS.

The Association failed to preserve error on the issue of entitlement to additional compensation for the soft metal damage. See Meier v. Senecaut, 641 N.W.2d 532, 537-39 (Iowa 2002). The District Court's ruling was silent as to findings and conclusions regarding the soft metals (siding, gutters and

fascia) other than to note the acknowledged payment by Depositors. (App. 345). The Association failed to seek enlargement of the Court's ruling to address the soft metal claim in a proper post-trial motion. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before [the appellate court] will decide them of appeal." Meier, 641 N.W.2d at 537 (other citation omitted). When the District Court fails to rule on an issue, the party who raised it must file a proper motion requesting a ruling to preserve error for appeal or the issue is deemed waived. Id. at 537-38 (other citation omitted). Therefore, the Appellate Court is without jurisdiction with regard to the soft metal claim.

Should the Court determine it has jurisdiction to consider the Association's claim for additional compensation for the soft metals, Depositors presents the following argument. Depositors introduced evidence at trial of payments it issued in the amount of $124,656.79 for hail damage to the Associations' "soft metals" (gutters, downspouts, and facia). (Def. Ex. G; Def. Ex. H-App. 304-305). This payment was issued based upon a detailed estimate prepared by Depositors for the soft metal damage for the covered part of the loss related to the August 8, 2012, storm. (Def. Ex. G; Def. Ex. H-App. 304-305). The Association has the burden to prove

at trial that it was entitled to additional damages related to the hail damage to the soft metals. No evidence was provided by the Association to the District Court regarding the soft metals other than a line item on an Appraisal Award form that the amount for "siding, gutters, fascia" is $119,656.51 actual cash value and $159,541.51 replacement cost. (App. 231). No testimony was provided from the Umpire as to how that amount was reached or how it differed from estimate prepared by Depositors.

The Depositors' Policy clearly denotes it owes only the actual cash value at the time of judgment, not replacement cost. (App. 283, Loss Payment, ¶5). Actual cash value "means the cost to repair or replace the Covered Property, at the time of loss or damage…with material of like kind and quality, subject to deduction for deterioration, depreciation…." (App. 291, Property Definitions, ¶2). This coincides with the prior payment by Depositors for the accepted portion of the claimed loss in which Depositors paid the actual cash value of the property covered by the Policy less the Association's deductible. (App. 304-305). The actual cash value determined by the Appraisal Award ($119,656.51) is less than the amount already paid by Depositors ($124,656.79). (App. 231, 304-305).

The Policy specifically provides that Depositors "will not pay on a replacement cost basis for any loss or damage: (i) until the lost or damaged

property is actually repaired or replaced; and (ii) unless the repairs or replacement are made as soon as reasonably possible after the loss or damage." (App. 283, Loss Payment, ¶5(e)(1)(c)). There was no evidence presented at trial that the Association had repaired or replaced the claimed damaged property, and therefore, there are no grounds for entry of an award for replacement cost. The Association's request for replacement cost is therefore without merit and contrary to the Policy provisions.

Therefore, it is Depositors' position that the Association did not preserve the issue related to the soft metals for appeal. If the Appellate Court determines error was preserved, the Association is not entitled to additional compensation. Depositors has already issued payment in an amount that exceeds the actual cash value of the appraisal award. Pursuant to the policy, the Association is not entitled to replacement cost.

CONCLUSION

Depositors Insurance Company requests the Association's appeal be dismissed for failure to file a timely notice of appeal. Should the Appellate Court determine the Association filed a timely appeal, Depositors Insurance Company requests the Findings of Fact, Conclusions of Law and Judgment entered by the District Court be affirmed in their entirety denying the

Association's breach of contact claim and dismissing its claim for declaratory judgment.

With regard to the Association's claim for soft metals, Depositors states the issue was not preserved for appeal. If it is determined by the Appellate Court that the issue was properly preserved, Depositors is required to only issue payment for actual cash value which it has in an amount that exceeds the amount contained in the appraisal award. The Association is entitled to no further compensation for soft metals.

HOPKINS & HUEBNER, P.C.

By /s/ *Apryl M. DeLange*
Apryl M. DeLange AT0001886

By /s/ *Jeff M. Margolin*
Jeff M. Margolin AT0004902
2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Telephone: 515-244-0111
Facsimile: 515-244-8935
adelange@hhlawpc.com
jmargolin@hhlawpc.com
ATTORNEYS FOR DEFENDANT-APPELLEE

REQUEST FOR ORAL SUBMISSION

Depositors Insurance Company requests to be heard in oral argument.

CERTIFICATE OF COST

Depositors Insurance Company certifies the cost of reproducing the Final Brief was $0 due to electronic filing.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because:

[X] this brief contains 7,200 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Apryl M. DeLange August 11, 2016
Apryl M. DeLange Date

CERTIFICATE OF SERVICE AND FILING

Counsel for Depositors Insurance Company certifies on August 11, 2016, this document was filed using the Electronic Filing System of the Court which automatically serves an electronic copy to:

Anthony R. Epping AT0002435
309 Court Avenue, Suite 225
Des Moines, IA 50309
Telephone: 515-885-4960
Fax: 515-875-4963
anthonyepping@eppinglawoffice.com

and

E. Curtis Roeder PHV000284
Timothy D. Johnson
7900 Xerxes Avenue South, Suite 2020
Bloomington, MN 55437
Telephone: 952-236-4171
Fax: 612-235-7927
croeder@rsjlawfirm.com
tjohnson@rsjlawfirm.com

ATTORNEYS FOR PLAINTIFF

HOPKINS & HUEBNER, P.C.

By /s/ *Apryl M. DeLange*
Apryl M. DeLange AT0001886

By /s/ *Jeff M. Margolin*
Jeff M. Margolin AT0004902
2700 Grand Avenue, Suite 111
Des Moines, IA 50312
Telephone: 515-244-0111
Facsimile: 515-244-8935
adelange@hhlawpc.com
jmargolin@hhlawpc.com

ATTORNEYS FOR DEFENDANT-APPELLEE